



In The

Supreme Court of the United States

October Term, 1978

No.

78-914

BARBARA BARRETT,

Petitioner,

vs.

STATE MUTUAL LIFE ASSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

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OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York, decided May 31, 1978, appears in the Appendix hereto (1a). The motion for reargument or to amend the remittitur was denied on September 14, 1978. The decision in respect thereto appears in the Appendix (2a). The opinion and order of the Appellate Division, First Department, dated July 14, 1977 after the second trial appears in the Appendix (3a). The opinion and order dated July 30, 1976 of the trial court on the second trial appears in the Appendix (11a). The opinion of the Appellate Division, First Department, dated October 23, 1975, after the first trial, appears in the Appendix (13a).

JURISDICTION

The judgment or decision of the Court of Appeals of the State of New York was entered on May 31, 1978. A timely motion for reargument or to amend the remittitur was denied on September 14, 1978, and this petition for certiorari is filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Where a jury's verdict in favor of plaintiff in the first trial is set aside on appeal for errors in the trial court's charge and the exclusion of evidence, and the appellate court (Appellate Division, First Department) states in its opinion that there are "factual issues for the jury to decide," and after retrial a jury renders its verdict again in favor of the plaintiff, may such second verdict be set aside by the same appellate court (Appellate Division, First Department), consisting of a different panel of judges and the Court of Appeals, and the action dismissed, where the evidence on both trials is substantially the same? Whether the setting aside of the jury's verdict and dismissal of the action after the second trial contravenes the constitutional right to a jury trial guaranteed by Article VII of the Amendments to the Constitution of the United States.

2. Whether the decision of the Appellate Division, First Department, after the second trial, which overruled the decision of the same Appellate Division, after the first trial, that the "factual issues were for the jury to decide," contravenes the "due process of law" and the "equal protection of the laws" provided by Article XIV of the Amendments to the Constitution of the United States.

3. Whether state courts, inclusive of the Court of Appeals, may disregard a constitutionally sound statute enacted by the

Legislature, to specifically overrule a Court of Appeals decision, and then decide the issues involved in the action contrary to the mandates of the statute and in accordance with such overruled decision.

4. Where the New York State Constitution limits the jurisdiction of the Court of Appeals in civil actions to a review of questions of law except where the Appellate Division, on reversing the final judgment in an action, finds new facts and a final order pursuant thereto is entered, may the Court of Appeals review questions of fact where the Appellate Division reversed on the law only, and a final order of reversal was entered by the Appellate Division on the law only?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VII of the Amendments to the Constitution of the United States provides:

"JURY TRIAL IN CIVIL CASES

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

Article XIV of the Amendments to the Constitution of the United States states in part:

"Section 1. CIVIL RIGHTS

... nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Subdivisions 2 and 3 of Section 149 of the Insurance Law of the State of New York provide:

"2. No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.

3. In determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible."

Article 6, Section 3a of the New York State Constitution provides:

"§3. Jurisdiction of court of appeals

A. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered;"

STATEMENT OF THE CASE

Petitioner, Barbara Barrett, brought this action as the beneficiary of a life insurance policy issued on October 29, 1969, on the life of her husband, Joseph P. Barrett, to recover the sum of \$20,000 from the respondent, State Mutual Life Assurance Company.

Defendant refused to pay the proceeds of the policy alleging material misrepresentations in the application.

The first trial resulted in a jury's verdict in favor of plaintiff. The verdict and judgment entered thereon were set aside and a new trial directed by the Appellate Division, First Department, for errors in the trial court's charge and in the exclusion of certain evidence, the appellate court stating significantly as follows:

"Under these circumstances, whether Barrett's answers on the application for the policy were truthful or untruthful and, if untruthful, whether they constituted material misrepresentations as to any pre-existing hernia or heart condition, were essentially factual issues for the jury to decide."

Under this ruling a second jury trial was held which resulted in the second jury finding a verdict again for the plaintiff.

The trial court on the second trial denied respondent's motion to set aside the jury's verdict or for a mistrial, holding there "is no substantial change in the testimony in the two trials."

The same Appellate Division, First Department, but consisting of a different panel of judges, thereafter set aside the jury's verdict and dismissed the complaint, criticizing the decision of its court of coordinate jurisdiction, and holding that its decision was erroneous, as follows:

"These errors effectively rendered the first trial a charade and a nullity, and, in reversing, the question of prima facie case was never truly passed on. It is not the law of this case that plaintiff heretofore [referring to the first trial] made a prima facie showing." (Bracketed material ours.)

The second Appellate Division dismissal was contrary to the first Appellate Division decision that the issues were for the jury, which had remanded the case for retrial. The Court of Appeals affirmed.

The respondent's physician, who examined the insured before the policy was issued, found the insured to be in perfect health. There was no finding of a heart irregularity. The insured had not complained of any chest pains, even with extensive activity, for a period of approximately five years before the issuance of the policy. Pain in the region of the chest, as is well-known, can sporadically occur for many reasons such as pain originating in the muscles or bones of the chest, hiatus hernia, neurological conditions, strenuous exercise, indigestion, etc. True angina pain keeps repeating itself after exertion, which did not occur in this case. This old, non-related symptom to heart disease was borne out by the medical testimony at both trials and from respondent's underwriting manuals. The insured's freedom from heart disease was further proven by the fact that after many years he died from cancer.

A grave injustice was done to petitioner by the setting aside of the second jury verdict in favor of the plaintiff. This contravened her rights to a jury trial of the factual issues guaranteed by Article VII of the Amendments to the Constitution of the United States.

The overruling of the prior decision of the first Appellate Division by the second Appellate Division (the same court but a different panel) that the issues in this case were for the jury and which was affirmed by the Court of Appeals further violated petitioner's right of "due process of law" and "the equal protection of the laws" guaranteed by Article XIV of the Amendments to the United States Constitution.

There was also applicable in this case a constitutionally enacted statute [Section 149, Insurance Law (1940)], overruling

a prior Court of Appeals decision [*Geer v. Union Mutual Life Ins. Co.*, 273 N.Y. 261 (1937)] which was not followed by the appellate courts, but which still adhered to this overruled decision.

The constitutional questions appear from petitioner's arguments in briefs before the appellate courts and are also particularly and specifically raised on petitioner's motion for reargument and to amend the remittitur of the Court of Appeals, which the court denied.

REASONS FOR GRANTING THE WRIT

I.

The decision below contravenes petitioner's constitutional right to a jury trial of the factual issues.

The jury and the trial judge on the second trial heard all the evidence adduced by petitioner and respondent, saw the witnesses and evaluated their testimony and credibility as to whether there was a material misrepresentation and whether defendant-respondent would have issued the policy. Under proper instructions set forth by the first Appellate Division after the first trial, as was precisely followed by the trial judge in instructing the second jury, a verdict in favor of the plaintiff was again found by another jury.

The setting aside of the jury's verdict and the dismissal of the case is in direct violation of the guaranteed constitutional right of the petitioner to trial by jury (Article VII of Amendments to the United States Constitution).

II.

The evidence in both trials was substantially the same.

The trial judge on the second trial, who saw and heard the witnesses, and who had examined the first trial record, and who was best qualified to do so, determined that the evidence in both trials was substantially the same. In denying respondent's motion to set aside the jury's verdict and for dismissal of the complaint, or for a new trial, at the end of the testimony, he stated as follows:

"THE COURT: There's no such evidence in this record before me. I have followed this case carefully and I see that the evidence of this trial is substantially the same as it was at the first trial, and that the first trial went up to the Appellate Division and there was a reversal of the first trial. If they wanted it dismissed because of misrepresentations, they obviously could have done so in the Appellate Division saying that there had been no case proved. I find absolutely nothing substantially different.

... I find that if the learned Appellate Division found that there wasn't a *prima facie* case, or that the complaint should have been dismissed either at the end of the plaintiff's case or at the end of the entire case at the last trial, they would have so decided in their decision on the appeal."

The said trial court's decision on a written motion made by respondent to set aside the jury's verdict and for dismissal of the complaint or for a new trial held:

"The court finds that there is no substantial change in the testimony in the two trials except

the court permitted the introduction of the evidence as directed by the Appellate Division."

The setting aside of the second jury's verdict and the dismissal of the case, therefore, is in direct violation of the guaranteed constitutional right of the petitioner to trial by jury (Article VII of Amendments to the United States Constitution).

III.

The overruling by the second Appellate Division of the decision of the first Appellate Division, a court of coordinate jurisdiction, was a violation of petitioner's constitutional rights of due process and equal protection of the laws (Article XIV of the Amendments to the United States Constitution).

The first Appellate Division held that there were triable issues for the jury to determine, after reviewing the evidence. The second Appellate Division, in effect, overruled this determination, holding that: "It is not the law of this case that plaintiff heretofore (referring to the first trial) made a *prima facie* showing," thus determining that the issues were not for the jury.

It is axiomatic that a court of coordinate jurisdiction may not reverse the ruling of a prior court. If it does, it is a violation of due process and equal protection of the laws, provided by the Fourteenth Amendment to the Constitution of the United States.

IV.

The state courts had no power to disregard and decide the issues contrary to the provisions of Section 149 of the Insurance Law (1940), a constitutionally sound statute.

The second Appellate Division in its opinion relied upon and cited the case of *Geer v. Union Mutual Life Insurance Co.*, 273 N.Y. 261 (decided in 1937), which determination was affirmed by the Court of Appeals. The majority opinion in the *Geer* case enunciated the "freedom of choice" rule, which was overruled by the New York Legislature by the enactment of Section 149 of the Insurance Law in 1940. Despite this, the second Appellate Division quoted the following language in its opinion which is contrary to the statute:

"The major question is whether the company has been induced to accept an application which it might otherwise have refused (see *Geer v. Union Mutual Life Ins. Co.*, 273 N.Y. 261)."

By overruling the decision in *Geer*, through the enactment of Section 149 of the Insurance Law, the Legislature adopted the decision and reasoning of Judge Finch, stated and discussed in his dissenting opinion in *Geer*. The rule of "freedom of choice" as determined by the majority in *Geer* was supplanted by this legislative mandate.

No longer, because of the act of the Legislature in 1940, does a misrepresentation become material, as set forth by the majority in *Geer*, because the question is asked in the application under the so-called doctrine of "freedom of choice." It must, in fact, be material to the risk and the insurance company must additionally prove that they would not have issued the policy under its practices. These issues ordinarily, as determined by the first Appellate Division in our case, are for the jury.

Judge Finch, in his dissenting opinion in *Geer* (273 N.Y. 261, 275-277), which was adopted by the enactment of Section 149, commented, *inter alia*, as follows:

"It is argued that where an insurance company by specific questions requests information, any untrue representation or concealment in the answer, however innocent, is material as a matter of law, and that the test is not whether the insurance company would have issued the policy if it had been apprised of the truth, but whether it had an opportunity to exercise its choice upon a disclosure of all the facts. . . .

By asking the question, has it made the answer material as a matter of law? . . .

A misrepresentation, as noted above, does not invalidate a policy unless it is material. . . .

The contention that answers to questions in the application concerning health are material as a matter of law is based upon the theory that if an insurance company evinces interest in the subject it thereby becomes material. *That is not the true test.*" (Emphasis ours.)

The Legislature, by enacting Section 149 which remains the law, has overruled the courts which is its right. In any event, we submit, the Finch rule, as adopted by the Legislature, was far more fair and reasonable in a contest between an insured or beneficiary and their insurance company.

We now refer to more authoritative voices than ours, Judge Rippey, in *Glickman v. New York Life Insurance Company*, 291 N.Y. 45, 53-58, although he dissented on other points, had the

opportunity to review and comment upon the *Geer* case and the purpose of the enactment of Section 149 in the following language. Referring to the *Geer* case, he stated:

"Notoriously, to overcome the legal effect of that and previous decisions, the Legislature enacted sections 149 and 150 of chapter 882 of the Laws of 1939. The purpose of the Legislature is not open to debate. The language used is clear and unambiguous. There is no field open for construction on the question under consideration. Whether a false representation or suppression of a fact for which information is requested by the insurer as a condition antecedent to the completion of a contract of insurance tends to diminish or increase the risk of loss and is material to the risk . . . are no longer questions of law for the court but are now questions of fact which must be determined as such under rules applicable to other cases where questions of fact arise. Unless the misrepresentation or suppression of a fact or breach of warranty, if any such occurs, by the insured is found, as a fact, to be material to the risk, recovery on the contract may no longer be avoided. In no case may it now be held that recovery on a policy of life insurance may be avoided by a mere false representation or misrepresentation of a fact or by the suppression of a fact called for in an application for an insurance policy, without more, whether it becomes by statutory definition a part of the ultimate contract or a 'warranty' or not. *No court has the right nor will it be presumed to undertake by any process of reasoning to nullify a mandate of the Legislature so clear and unequivocal for the sake of salvaging some previous decision that may be on the books.*" (Emphasis ours.)

To the same effect is *Giuliani v. Metropolitan Life Insurance Company*, 269 App. Div. 376. In *Giuliani* the court also historically discussed the background of Section 149 of the Insurance Law relating to the reason for the enactment of Section 149, including the overruling of *Geer* which we discussed and quoted from in our motion for reargument before the Court of Appeals at pages 20 and 21.

It is submitted that the judiciary cannot override an act of the Legislature "so clear and unequivocal," unless it was unconstitutional.

The "freedom of choice rule" adopted by the New York appellate courts, following the majority in the *Geer* case, meant a misrepresentation becomes material, if the answer to the question in the application is untruthful. It still would result in rescission, even if, inquiry by the company would have resulted in issuance of the policy. Furthermore, under the *Geer* decision, whatever proof as to practice by the insurance company is offered it, is not subject to the test of credibility by a jury. These rulings, following the discarded *Geer* case, have rendered nugatory the rights of beneficiaries in life insurance cases, including the plaintiff.

V.

The Court of Appeals of the State of New York lacked jurisdiction under the Constitution of the State of New York to review the facts, since the Appellate Division reversed on the law only.

The Constitution of the State of New York, under Article 6, Section 3a, grants jurisdiction to the Court of Appeals in civil cases to review questions of law, except where the Appellate Division reverses on facts, as well, finding new facts, and a final order pursuant thereto is entered. In the case at bar the second Appellate Division's reversal was on the law only. The Court of Appeals therefore lacked jurisdiction to review the facts herein.

Thus, it follows that questions of fact, the credibility of witnesses, the quality, persuasiveness and weight of the evidence are matters for the triers of facts, or the jury, and are beyond review by the Court of Appeals. The Court of Appeals determined here questions of fact prohibited by the Constitution of the State of New York.

In our case, the opinion of the second Appellate Division does not discuss any additional evidence but is a criticism of the evidence on the second trial. The sole basis of the reversal by the second Appellate Division was that a *prima facie* case in the first trial was not made.

The Court of Appeals could not therefore make such determination, constitutionally, because the Appellate Division had reversed only upon the law, nor can the Court of Appeals make a determination that defendant was entitled to a directed verdict on the merits, since this would entail going into and reversing the findings of facts by the jury.

CONCLUSION

We respectfully submit that this case is indeed unique and of great public importance in that two juries determined the issues in favor of the plaintiff and the second trial was based upon the direction of the Appellate Division that the issues were for a jury, concurred in by the two trial judges who saw and heard all the evidence. Nevertheless, the second Appellate Division, a court of coordinate jurisdiction, overruled the first Appellate Division and dismissed the action, and this determination was affirmed by the Court of Appeals.

It is also submitted that the state courts had no power to disregard a valid remedial statute enacted by the Legislature to supplant its prior determination in *Geer, supra*.

Finally, the Court of Appeals lacked jurisdiction to review the facts.

The setting aside of the jury's verdict, which was rendered in favor of the plaintiff for the second time, and a dismissal of the action, violated the time-honored constitutional right to trial by jury, and renders such right meaningless and worthless. The plaintiff beneficiary, upon the second trial, followed the rulings of the first Appellate Division, in a retrial of the issues before a second jury in this \$20,000 life insurance case, consuming a great deal of time and effort in these two trials and these various appeals, and was successful for a second time before a jury, after painful and expensive litigation. Most citizens, in contrast with the insurance companies, could not, and would not, pursue, as here, their just rights. It is unfair and inequitable that all this should go for naught.

We respectfully urge that because of these determinations, not only are the rights of the citizenry generally constitutionally violated, but, particularly, the rights of insureds and their beneficiaries of life insurance in the State of New York, including this beneficiary, are nullified by what we respectfully submit are erroneous determinations. These constitutional questions, of right to trial by jury, due process and equal protection of the laws, we earnestly urge, deserve a review by this final tribunal.

For these reasons, we respectfully submit that a writ of certiorari should issue to review the decisions, orders and the opinions of the Court of Appeals of the State of New York.

Respectfully submitted,

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APPENDIX

OPINION OF COURT OF APPEALS DECIDED MAY 31,
1978

STATE OF NEW YORK
COURT OF APPEALS

No. 230

Barbara Barrett,

Appellant,

vs.

State Mutual Life Assurance Company,

Respondent.

(230) Samuel Sherman & Leon Wasserman, NYC, for
appellant.

William E. Kelly & C. Robert Prianti, NYC, for
respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed with costs. We agree that the Appellate Division was not bound by its earlier determination, as the law of the case, because of the additional and persuasive evidence on the second trial. On the merits we find that the defendant was entitled to a directed verdict for the reasons stated in the *Per Curiam* opinion at the Appellate Division (58 AD2d 320; see also, *Process Plants Corporation v. Beneficial National Life Ins. Co.*, 42 NY2d 928, aff'd, 53 AD2d 214).

* * *

Opinion of Court of Appeals Decided May 31, 1978

Order affirmed, with costs, in a memorandum. All concur.

Decided May 31, 1978

**DECISION ON MOTION FOR REARGUMENT OR TO
AMEND REMITTITUR DATED SEPTEMBER 14, 1978**

Mo. No. 735

[SAME TITLE]

Motion for reargument denied with twenty dollars costs and necessary reproduction disbursements. Motion for alternative relief, treated as one to amend the remittitur to state that a Federal question was raised and necessarily passed upon, denied.

**DECISION COURT OF APPEALS
SEP. 14, 1978**

**ORDER OF APPELLATE DIVISION DATED JULY 14,
1977**

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on July 14, 1977.

Present—Hon. Harold Birns, Justice Presiding,
Herbert B. Evans
Louis J. Capozzoli
Arthur Markewich, Justices.

Barbara Barrett,

Plaintiff-Respondent,

-against-

State Mutual Life Assurance Company,

Defendant-Appellant.

456-57

Appeals having been taken to this Court by the defendant-appellant from a judgment of the Supreme Court, New York County (Smith, J.) entered on July 7, 1976 in favor of the plaintiff in the amount of \$28,724.61 and from an order of said Court entered on July 30, 1976, denying defendant's motion to set aside the verdict, and said appeals having been argued by Mr. William E. Kelly of counsel for the appellant, and by Mr. Samuel W. Sherman of counsel for the respondent; and due deliberation having been had thereon, and upon the Per Curiam Opinion filed herein,

Order of Appellate Division Dated July 14, 1977

It is unanimously ordered that the judgment so appealed from be and the same is hereby reversed, on the law, vacated and the complaint dismissed without costs and without disbursements. The Clerk is directed to enter judgment in favor of the appellant dismissing the complaint. It is further unanimously ordered that the appeal from the order entered on July 30, 1976 be and the same hereby is dismissed as academic, without costs and without disbursements.

ENTER:

s/ Jerome L. Reinstein

OPINION OF APPELLATE DIVISION DATED MAY 1977

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT**

Harold Birns, J.P.
Herbert B. Evans
Louis J. Capozzoli
Arthur Markewich, JJ.

[SAME TITLE]

456-457

Separate appeals from a judgment of the Supreme Court, New York County (Smith, J.), entered on July 7, 1976, in favor of the plaintiff-respondent in the aggregate sum of \$28,724.61, and from an order of said Court entered on July 30, 1976, denying defendant-appellant's motion to set aside the verdict.

William E. Kelly of counsel (Charles M. Pratt and C. Robert Prianti with him on the briefs; Casey, Lane & Mittendorf, attorneys) for defendant-appellant

Samuel W. Sherman of counsel (Leon Wasserman, attorney) for plaintiff-respondent.

PER CURIAM:

We here review a plaintiff's judgment following the second trial of this lawsuit after our remand for retrial (49 A D 2d 856). The subject of the suit and its basic issues are well stated in that memorandum opinion:

" . . . Plaintiff, Barbara Barrett, brought this action as the beneficiary of a life insurance policy

Opinion of Appellate Division Dated May 1977

on the life of her husband, Joseph F. Barrett (hereinafter 'Barrett'), to recover the sum of \$20,000 from the defendant State Mutual Life Assurance Company. On October 7, 1969, Barrett executed Part I of the application for life insurance. He there agreed that defendant would not be liable on its policy unless the policy was delivered during his lifetime and sound health and then only if he has not consulted or been treated by any physician since the completion of Part II. On October 17, 1969, Barrett completed Part II. He there denied *inter alia*, (1) any history of chest pains or heart disease; (2) that he contemplated an operation; and (3) that he now smokes or has smoked within the preceding 12 months. After an examination by defendant's doctor, defendant was advised that Barrett was healthy. Barrett died in May, 1970 of cancer. Defendant refused to pay the proceeds of the policy alleging material misrepresentations in Part II and that the insured's health and insurability were not the same as described in Parts I, II and the smoking statement of the application . . . [pages 856-7]"

It is urged upon us that we may not consider defendant's arguments as to sufficiency of the evidence because we have heretofore impliedly held that plaintiff's case is prima facie sufficient in that our prior reversal of a judgment in plaintiff's favor remanded the cause for a new trial. Indeed, our memorandum opinion contains the now troublesome statement that " . . . whether Barrett's answers on the application for the policy were truthful or untruthful and, if untruthful, whether they constituted material misrepresentations as to any preexisting hernia or heart condition, were essentially factual issues for the jury to decide [prior appeal, page 857]." This

Opinion of Appellate Division Dated May 1977

statement was, however, followed on the same page by the notation " . . . that the trial court improperly excluded evidence of defendant's underwriting practices . . . [and] erroneously charged, in effect, that an innocent misrepresentation as to the questions asked is not sufficient . . . " These errors effectively rendered the first trial a charade and a nullity and, in reversing, the question of prima facie case was never truly passed on. It is not the law of this case that plaintiff heretofore made a prima facie showing. In this regard, we distinguish *Politi v. Irvmar Realty Corp.* wherein a new trial had been ordered "solely on the ground that the verdict was against the weight of the credible evidence." [13 A D 2d 469]. Therefore, we may consider defendant's arguments as to sufficiency of the evidence. However, even if we had impliedly held that a prima facie case had been established on the first trial, there are "extraordinary circumstances" (*Politi*, page 469) which would here justify us in not considering that to be the law of the case. It must be recalled that our holding reversing the first trial's verdict effectively said that that case had been considered by the jury on an erroneously circumscribed record in the light of an incorrect instruction as to applicable law. Though this second trial was not exactly free of error, the record establishes to our satisfaction that defendant was entitled to a directed verdict on the entire case.

Plaintiff's case was presented by her own formal testimony establishing the insurance contract, payment of the premium, death of plaintiff's decedent, demand for and refusal of payment. The representations made by the decedent and set forth in the documents were as excerpted above from the opinion reversing the first verdict. On further examination by the defense, she admitted that her husband had, within five years preceding application for the policy, experienced symptoms usually associated with a heart condition and had consulted Dr. Davidoff concerning "chest throbs" and taken medication therefor prescribed by the doctor. Further, that during this time, he had been placed on a restricted diet by the doctor. Moving to

Opinion of Appellate Division Dated May 1977

the defendant's case, Dr. Davidoff was called as defendant's witness and testified that shortly before the five year period, the decedent had consulted him for chest pains, diagnosed as angina pectoris, for which he had prescribed medication, inclusive of, in December, 1964, nitroglycerin. The condition was relieved by January, 1965, but he was consulted again in January, 1966, and again prescribed the nitro. Decedent underwent a hernia operation toward the end of 1969, at which time he gave the anesthesiologist a history: "53 year old male for right inguinal herniorrhaphy. Agrees to spinal anesthetic. History of A.S.H.D. [Arteriosclerotic Heart Disease] with angina pectoris. On Peritrate. EKG within normal limits." It is noted that the answers to defendant's questions included negative replies to questions as to whether, "within the past five years" he had had "pain or pressure in the chest" or had "ever been on a restricted diet" or "ever consulted or sought advice from a physician . . . for any reason not already mentioned." It is unnecessary to go further.

Quite obviously, the evidence demonstrates without contradiction that the decedent's answers were at variance with the facts. Further, these facts were patently material; indeed, it was part of defendant's evidence — correcting one of the first trial's errors — that, had defendant known the truth, the policy in evidence, whatever may have been done about a possible higher premium rate, would not have issued in the form found here.

"It is the rule that even an innocent misrepresentation as to specific diseases or ailments, if material, is sufficient to allow the insurer to avoid the contract for insurance or to defeat recovery thereunder (*Eastern Dist. Piece Dye Works v. Travelers Ins. Co.*, 234 NY 441, 449-450; 30 NY Jur, Insurance, §§947, 949). Subdivision 2 of section 149 of the Insurance

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Law provides that "[n]o misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract." Further, subdivision 4 of section 149 of the Insurance Law states that a misrepresentation that an applicant has not had previous medical treatment shall be deemed, for the purpose of determining its materiality, a misrepresentation that the applicant has not had the ailment for which treatment was given. Ordinarily, the question of materiality of misrepresentation is a question of fact for the jury. However, where the evidence concerning the materiality is clear and substantially uncontradicted, the matter is one of law for the court to determine. The test is whether failure to furnish a true answer defeats or seriously interferes with the exercise of the insurance company's right to accept or reject the application. The major question is whether the company has been induced to accept an application which it might otherwise have refused (see *Geer v. Union Mut. Life Ins. Co.*, 273 NY 261). Applying the foregoing test to the instant facts, it is clear that the misrepresentation is material as a matter of law and that the complaint should have been dismissed. [*Process Plants Corp. v. Beneficial National Life Insurance Co.*, 53 A D 2d 214, 216-217]."

The case is directly in point, and its teaching dictates that, on the entire case, the defendant's motion for direction of verdict in its favor should have been granted.

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Were we not reversing and dismissing the complaint we would remand for two trial errors which, inter alia, prevented defendant from enjoying a fair trial. Decedent's physician, Dr. Davidoff, obviously an unwilling witness, was questioned by defense counsel as to the use of nitroglycerin for his patient. The court cut off an answer by observing that "the implication or inference therefrom is so obvious." That observation could mean only one thing, that the drug was used for heart problems. If that obvious, a verdict for defendant should have been directed; if not, then the answer should have been permitted. Again, Dr. Davidoff, who minimized the decedent's medical problems, testified that, about the time that his patient was in the hospital, he had prepared a record of his medical involvements, inclusive of "treatment for angina pectoris." Though the contradiction is obvious, the record was rejected as evidence.

Accordingly, the judgment for plaintiff, entered July 7, 1976, in Supreme Court, New York County, after trial to a jury (Smith, J.), should be reversed, on the law vacated, and the complaint dismissed, without costs. The appeal from the order denying defendant's motion to set aside the verdict should be dismissed, without costs, as academic.

All concur.

**OPINION AND ORDER OF JUSTICE IRVING SMITH,
DATED JULY 30, 1976, (1) DENYING DEFENDANT'S
MOTION TO SET ASIDE THE VERDICT OR (2) FOR A
NEW TRIAL**

New York Supreme Court

County of New York

TRIAL TERM PART 17

INDEX NUMBER 7698-1973

PRESENT:

HON. IRVING SMITH
Justice.

BARBARA BARRETT

v

STATE MUTUAL LIFE INSURANCE

The following papers numbered 1 to #7 read on this motion
Submitted this 30 day of July 1976

Calendar No	PAPERS NUMBERED
Notice of Motion and Affidavits Annexed	1-3
Answering Affidavits Answering affidavit received in Pt. 17	3
Replying Affidavits	4
Exhibits	5-6-7

*Opinion and Order of Justice Irving Smith, Dated July 30, 1976,
(1) Denying Defendant's Motion to Set Aside the Verdict or (2)
For a New Trial*

Upon the foregoing papers this motion is denied. The court finds that there is no substantial change in the testimony in the two trials except the court permitted the introduction of the evidence as directed by the Appellate Division.

The motion to set aside the verdict and dismissing the complaint or in the alternative directing a new trial because it is contrary the weight of evidence as denied.

FILED

JUL 30 1976
NEW YORK
CO. CLERK'S OFFICE

Dated: July 30, 1976

I.S.

J. S. C.

**OPINION OF THE APPELLATE DIVISION, DATED
OCTOBER 23, 1975, DIRECTING NEW TRIAL**

Stevens, P.J., Murphy, Lupiano, Lane, Nunez, JJ.

1153

Barbara Barrett,

Plaintiff-Respondent, S.W. Sherman

- against -

State Mutual Life Assurance Company,

Defendant-Appellant. C.M. Pratt

Judgment, Supreme Court, New York County (Kaplan, J., and a jury), entered December 30, 1974, in favor of plaintiff, in an action brought to recover the proceeds of a policy of life insurance allegedly issued to plaintiff's deceased husband, unanimously reversed, on the law and the facts, and a new trial directed with \$60 costs and disbursements to abide the event.

Plaintiff, Barbara Barrett, brought this action as the beneficiary of a life insurance policy on the life of her husband, Joseph F. Barrett (hereinafter "Barrett"), to recover the sum of \$20,000 from the defendant State Mutual Life Assurance Company. On October 7, 1969, Barrett executed Part I of the application for life insurance. He there agreed that defendant would not be liable on its policy unless the policy was delivered during his lifetime and sound health and then only if he has not consulted or been treated by any physician since the completion of Part II. On October 17, 1969, Barrett completed Part II. He there denied, *inter alia*, (1) any history of chest pains or heart disease; (2) that he contemplated an operation; and (3) that he now smokes or has smoked within the preceding twelve months. After an examination by defendant's doctor, defendant was advised that Barrett was healthy. Barrett died in May, 1970 of cancer. Defendant refused to pay the proceeds of the policy

*Opinion of the Appellate Division, Dated October 23, 1975,
Directing New Trial*

alleging material misrepresentations in Part II and that the insured's health and insurability were not the same as described in Parts I, II and the Smoking Statement of the application.

At trial, testimony was introduced tending to show that Barrett, in 1964, suffered from some sort of coronary insufficiency, perhaps angina pectoris, and that Barrett had been hospitalized in December, 1969 for the repair of a hernia which had been diagnosed in early October, 1969. Further testimony was elicited tending to show that in 1966 there was no further evidence of heart disease and that it could not be stated with medical certainty that Barrett had heart trouble or heart disease in 1964. Under these circumstances, whether Barrett's answers on the application for the policy were truthful or untruthful and, if untruthful, whether they constituted material misrepresentation as to any pre-existing hernia or heart condition, were essentially factual issues for the jury to decide. It is noted that the trial court improperly excluded evidence of defendant's underwriting practices by restricting defendant solely to the introduction of the underwriting manual (See Insurance Law §149[3]; *Orenstein v. Metropolitan Life Insurance Company*, 18 A.D.2d, 1016 [2nd Dept., 1963]). Further, the trial court erroneously charged, in effect, that an innocent misrepresentation as to the questions asked is not sufficient, but that Barrett must not only have had the conditions, he must have known he had those conditions in order to enable defendant to avoid the policy. It is well recognized that "the statutory provisions relating to misrepresentations have not changed the previous New York case law to the effect that an innocent material misrepresentation of fact is a sufficient ground of avoidance" (30 N.Y. Jur. Insurance §947; See Insurance Law §149; *E.D.P. Dye Works v. Travelers Ins. Co.*, 234 N.Y. 441 [1923]).

*Opinion of the Appellate Division, Dated October 23, 1975,
Directing New Trial*

Finally, defendant's contention that its first affirmative defense seeking rescission is equitable and should be tried by the court above is without merit. "After the death of the insured in a life policy, a court of equity should not take jurisdiction of a bill to secure the cancellation of the policy for fraud practiced in procuring its issuance, because the company *then* has an adequate remedy at law, in that it may set up the fraud in defense to any action brought on the policy" (*Equitable Life Assurance Society v. Kushman*, 276 N.Y. 173, 182 [1937], citing *Black on Rescission and Cancellation* [Vol. 3, p. 1569, §652]) (Emphasis supplied).

Order filed.